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Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 84-993

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., J. RAY MCDERMOTT & CO., CATALYTIC, INC., and BURNS & ROE, INC.,

Petitioners

v.

STIBITZ, DONALD A., NEW FREEDOM LUMBER CO., INC., RICHARD K. BAADE AND SHIRLEY A. BAADE, HIS WIFE, ALBERT C. GEORGE AND M. ISABEL GEORGE, HIS WIFE, VICTOR HEBEL, P. G. ENGINEERING, CHANCEFORD MANOR VILLAGE SEWAGE CO., INC., CHANCEFORD MANOR VILLAGE WATER CO., INC., DOROTHY S. HOSTETTER, L. RICHARD HARNER AND LINDA HARNER, HIS WIFE, JAMES BARRON AND DIANE BARRON, HIS WIFE, MARGARET MARY JONAS, CUMBERLAND WOODCRAFT COMPANY, INC., POCONO BUSINESS FURNITURE, INC., FORGET-ME-NOT, INC., LARRY WELKER FORD, INC., DR. MAXINE C. BUSH, REV. ALVA TOMPKINS, MUSETTE DUGGAN, WELS I. ZIMMERMAN, HARRY WALLACH, MARY W. HUTCHINSON, STEPHEN M. YOUNG, FMG INVESTMENTS, INC., GETTYSBURG TOURS, INC., HERITAGE INNS, INC., L. E. SMITH WHOLESALE DISTRIBUTORS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY BRIEF ADDRESSING ARGUMENTS FIRST RAISED BY RESPONDENTS

Respondents suffered summary judgment in the district court, but had their claim revived by the decision of the Court of Appeals ordering that the action be dismissed for lack of subject matter jurisdiction. In such circumstances, it may not be surprising that respondents now recant their original invocation of federal jurisdiction and find persuasive the reasoning of the Court of Appeals. It is surprising, however, that they suggest to this Court that petitioners lack "standing" to seek review of the Court of Appeals' decision because they were the "prevailing" parties[1].

The fallacy of respondents' contention is apparent at two levels. First, wholly aside from the fact that petitioners lost the benefit of a judgment on the merits, a decision, denying subject matter jurisdiction is reviewable in this Court at the behest of a party asserting a right to litigate in federal court.[2] Here, petitioners have a stake in federal subject matter jurisdiction, they have been deprived of that jurisdiction, and the controversy is sharply presented to this Court.

Second, respondents' fundamental premise, that petitioners prevailed in the Court of Appeals, is directly

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1. *See* Response to Petition, pp. 5-6.

2. If citation is necessary to support this point, any one of a myriad of cases in which the determination of jurisdiction was made before any decision on the merits will suffice. See, *e.g.*, *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983). The fact that petitioners were defendants rather than plaintiffs below is of no significance in the present context. Under existing law, defendants have as much right to federal jurisdiction under the "arising under" statutes as do plaintiffs. See 28 U.S.C. §1441. Contrary to the example cited by respondents (Response to Petition, p.7), this is not a case in which the federal district court remanded an action to state court, a decision which is not reviewable. The closer analogy is the case in which the district court refuses to remand and the Court of Appeals later reverses. The defendant unquestionably has standing to seek review of that decision in this Court. *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965).

at odds with reality. The only prevailing parties were respondents. In the district court, petitioners had obtained a judgment in their favor on the merits dismissing all of respondents' claims. Unless modified by the Court of Appeals, that judgment, by virtue of the doctrine of *res judicata*, foreclosed respondents from any further litigation of their claims in the state or federal courts.

The decision of the Court of Appeals rendered petitioners' judgment a nullity and provided respondents with the opportunity, which they did not have before, to relitigate their claims in the state courts unrestrained by the prior federal judgment. To contend, therefore, that petitioners prevailed because the district court was "affirmed" is an elevation of form over substance. As this Court has succinctly stated, the right to a judgment on the merits is so "substantial" that a party "is obviously aggrieved by the loss of that judgment." *Parr v. United States*, 351 U.S. 513, 517 n.9 (1956).

Beyond the standing issue, respondents have little to say about the worthiness of this case for review. They suggest, for example, that their claim may not exceed one billion dollars, hence (by implication) may not exceed the limit on liability under the Price-Anderson Act.[3] Petitioners agree that respondents' claim is, in their words, "speculative", and that were the merits of a damage calculation reached, far less should ultimately be in controversy. That does not diminish, however, the reach of the claim respondents have asserted, given the magnitude of the rate increases which have been ordered since the Three Mile Island accident. And far less does it argue that this case is not worthy of review.

Beyond standing and a quarrel over how many hundreds of millions they seek, respondents make only two other points. First, they argue that petitioners will suffer no prejudice if this case is begun anew in the state courts.[4] Second, they contend that petitioners agree that

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3. Response to Petition, p.3.
4. Response to Petition, p.7.

state law should apply in any event.[5] As to the latter point, petitioners have recognized throughout that the content of rules of decision drawn from state law will, as a matter of Congressional choice, play a significant role in this litigation; but that is the point of departure for petitioners' position, not its conclusion.[6] And as to whether there will be prejudice in a recommencement of this litigation in the state court systems, the prior discussion of the *res judicata* effect of the district court judgment is a full refutation; it is no accident that respondents' discussion on this point entirely ignores the judgment on the merits rendered against them. To the extent any further response is necessary as to either of these contentions, petitioners are content to rely on their statements in the Petition. In neither case does respondents' argument denigrate the importance of this case as one for review by this Court.

Respectfully submitted,

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5. Response to Petition, pp.7-8.

6. In fact, respondents have mischaracterized petitioners' consistent position with respect to the role which state law plays in relation to the Price-Anderson Act. That position is summarized in the Petition at pp.15-18.